

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF**

76-1044

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To be argued by
NANCY ROSNER

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 76-1044

UNITED STATES OF AMERICA,

Appellee,

—v.—

VIRGIL ALESSI,

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF FOR THE APPELLANT VIRGIL ALESSI

NANCY ROSNER,
Attorney for Appellant,
401 Broadway,
New York, New York 10013.
(212) 925-8844

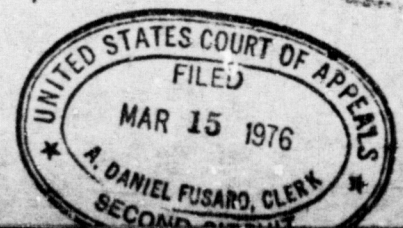


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-v-

VIRGIL ALESSI,

Appellant

BRIEF FOR THE APPELLANT VIRGIL ALESSI

THE FACTS

ONCE IN JEOPARDY AND THE PROMISE
MADE

THE FACTS:

In 1972, Virgil Alessi and Vincent Papa, among others, were indicted in the Eastern District of New York for conspiracy to violate federal narcotics statutes during the period between April 1967 and December 18, 1971 (72 Cr.473). Count five of this indictment alleged that Vincent Papa, Anthony Passero, Anthony Loria, together with Virgil Alessi and Frand DiAmatto, had engaged in a continuing criminal

enterprise," in violation of 21 U.S.C. §848, an element of which is proof that the defendants had derived substantial income from their illegal narcotics activities.

On February 3, 1972, Vincent Papa and Joseph DiNapoli had been arrested in the Bronx in possession of a suitcase containing nearly one million dollars in cash-the same money ultimately adduced as evidence in Papa's case currently under appeal before this Court and adduced as proof that Papa and his co-conspirators (namely Virgil Alessi) derived "substantial income" from the transactions which formed the predicate of the continuing criminal enterprise count of the indictment (72 Cr.473) (affidavit of Gino E. Gallina App.at P12) It is hard to imagine a more impressive or dramatic piece of evidence. This million dollar seizure was not submitted to the grand jury which returned the indictment (72 Cr.473).

This indictment was based primarily upon the grand jury testimony of an unindicted co-conspirator, Stanton Garland. Based upon its in camera inspection of the grand jury minutes, the district court in Papa's case found the dimensions of the Eastern District conspiracy**to be as follows:

"...Stanton Garland, testified that defendant Danny Ranieri sold him five or six kilograms of heroin from March to June of 1971 in Queens County, New York. Sometime

*United States v. Papa, Docket No. 75-1208. Appeal from conviction in the Southern District of New York on 74 Cr.1082 superseding 74 Cr.251. This appeal is sub judice. It was argued 9/23/75 before panel of Friendly, Hays & Feinberg.
**This is the case arising out of 72 Cr. 473.

in June, 1971, the witness met Vincent Papa and Virgil Alessi, Ranieri's suppliers. From June to October, 1971, the witness made approximately eight more purchases of one or two kilograms of heroin each from Ranieri and Rocco Evangelista. Deliveries were made by Ranieri or Evangelista. The last purchase the witness made from Ranieri and Evangelista was on December 18, 1971, after which he was arrested. December 18, 1971, as mentioned above, is the date on which the conspiracy charged in the Papa-Alessi indictment ended by reason of discovery and arrest. The Grand Jury testimony previously mentioned was given in November 1971, and April 1972.

On June 30, 1972, the government's case was dealt a severe, if not fatal blow. The prosecution's key witness, Stanton Garland, disappeared from the jurisdiction, making successful prosecution unlikely. It was against this background, with the very real possibility that the case might be lost, that Virgil Alessi and the United States of America negotiated a plea arrangement on August 18, 1972 where pertinent terms were:

I. Vincent Papa was to plead guilty to Count I of the indictment and Count IV of a then unnumbered tax evasion information.

II Virgil Alessi, the petitioner, was to plead guilty to a superseding information, (72 Cr.1133), waiving

*72 Cr.473.

indictment thereunder.

III. The pleas of Papa and Alessi were to be accepted in satisfaction of the entire Eastern District indictment. In exchange for these pleas the government promised that neither Papa nor Alessi would be subject to further prosecution for any part or piece of the conspiracy which was the subject of the indictment and further that no overt act of that conspiracy would be made the basis of any substantive prosecution.

In good faith reliance upon the binding nature of the terms of the plea arrangement, Vincent Papa pled guilty on September 5, 1972, and was sentenced the same day to two concurrent five year terms of imprisonment.* On October 2, 1972 Virgil Alessi pled guilty before the Hon. Anthony J. Travia, and received a five year suspended sentence with a mandatory three year special parole.**

Following Papa's incarceration, he was indicted in the Southern District of New York (72 Cr.251). He moved for dismissal, contending that the conspiracy charged contained therein were identical in fact and law to those brought in the Eastern District indictment to which he had entered the guilty plea; in addition, he contended that the substantive counts of this new indictment were brought in derogation of the

*The minutes of this proceeding are in the appendix at p.87

**The minutes of this proceeding are in the appendix at p.52

argument which had disposed of the Eastern District indictment. Following a hearing on January 16, 1975*, the Hon. Charles Brieant denied the motion. The due process and double jeopardy issues which were raised on that motion are now sub judice before the United States Court of Appeals for the Second Circuit, Docket No. 75-1208**.

On September 16, 1975 a grand jury sitting in the Eastern District of New York returned two indictments (75 Cr. 686 and 75 Cr. 687), both of which charged Alessi and Papa with conspiracy and substantive counts of violation of the federal narcotics laws. Alessi and Papa moved to dismiss both indictments on former jeopardy and denial of due process grounds. The gravamen of the due process claim was that these indictments were in direct contravention of the express terms of the plea bargain entered into by both defendants in 1972. On October 17, 1975 the Hon. Orrin Judd ruled that the conspiracies charged in indictment Nos. 75 Cr. 686 and 75 Cr. 687 were indistinguishable from the conspiracy to which Papa and Alessi pled. He then dismissed both indictments as violative of the

*Set forth in the appendix at p. 96

**Although Gino E. Gallina has not been privy to Judge Brieant's order, upon information and belief it was based on an issue not germane to this motion, i.e. that the United States Attorney for the Southern District is bound by plea bargains of the United States Attorney for the Eastern District. A similar motion is also pending before Judge Bonsal in the Southern District re: a narcotics indictment of Mr. Alessi. Neither Judge Brieant's denial nor any determination by Judge Bonsal will be dispositive of the issue here, i.e., whether the 1972 plea covered the tax aspects of the narcotics conspiracy.

double jeopardy and due process rights of both defendants.

The defendant Alessi was also indicted in the Southern District for conspiracy and substantive narcotics violations (75 Cr.772). A motion for dismissal on double jeopardy and due process grounds is currently pending before the Hon. Dudley B. Bonsal, United States District Judge for the Southern District of New York.

TWICE IN JEOPARDY AND THE PROMISE BROKEN

THE INSTANT INDICTMENT.

Virgil Alessi is charged in the indictment at issue here (75 Cr.295) with four counts of income tax evasion and four counts of failure to file for the years 1968,1969,1970 and 1971*. This indictment violates the 1972 plea agreement negotiated between Assistant United States Attorney James Druker and the defendants Alessi and Papa.

It must first be pointed out that although most of the on-the-record colloquies in this matter relate explicitly to Mr. Papa, everything that was said with regard to the plea and sentence arrangements was fully applicable and known to Mr. Alessi*; Gino E. Gallina, Esq. participated in these negotiations on behalf of both defendants (Appendix at p.15) and also participated in the plea and sentence proceedings of both men: it was, as Mr. Druker put it during the hearing before Judge Brieant, "a package deal" (appendix at p. 15); Judge Judd**agreed that Mr. Alessi's plea "was made in reliance on the same discussions that had been had with Mr. Druker" in further clarification of this Mr. Papa's counsel stated on behalf of Mr. Alessi:

* To the extent, if any, that the record is unclear, it is respectfully suggested that this Court order a testimonial hearing as Judge Brieant's, when he stated, "you can't determine contested facts on affidavits" (Mins. 1/16/75 at 27). See, e.g., United States v. Ciotti, 469 F.2d 1204 (3d Cir.1972); United States v. Carter, 454 F.2d 426,428 (4th Cir. 1972); United States v. Paiva, 294 F.Supp. 742 (D.C.,D.C.,1969).

**Judge Judd dismissed indictment 75 Cr.686 as against Papa; 75 Cr.687 against Alessi was nol. pros.

"There is one fact I believe all parties agree on, which seems, possibly through inadvertence, not to have clearly come through in the briefing of the issues, and I'll refer to this your Honor: It's the parties' understanding that all persons who took dispositions in connection with 72 Cr. 473, which was the indictment that Mr. Papa pled to, including Mr. Alessi, who, of course, pled to a superseding information, received the full benefit of Mr. Druker's proposition with respect to possible future prosecutions--just the same way that Mr. Papa did.

In short, Judge, Mr. Alessi's plea to the superseding information was in satisfaction of 72 Cr. 473, and we submit for the purpose of these motions, your Honor, that was identical to a plea to that indictment." *

Not only is it clear that "Papa" plea negotiations were intended to cover Alessi, it is clear that the agreement was intended to bar precisely the kind of tax prosecution attempted here; Druker testified that he considered that his promise not to prosecute Papa on "any other piece of this conspiracy" required him to inform Papa of a pending tax investigation; Papa was, of course, permitted to plead to a hastily-drawn and then un-numbered information, demonstrating that the plea was a mere formality for closing the investigation out (Appendix a p. 16); the identity of the tax case and the narcotics conspiracy was made crystal clear by Mr. Druker when he advised the Court:

"Your Honor, of course, the tax evasion is related to the other case insofar as the income and I would agree with counsel that as far as sentence is imposed, it should be concurrent." (Appendix at p. 16)
(emphasis added).

Notice of motion and affidavit by Gino E. Gallina (Appendix at p. 16)

*Notice of motion and affidavit by Gino E. Gallina (Appendix at p. 16).

Although appellant does not know when the investigation arose that led to the present indictment, there can be no question that the facts which underlay the alleged evasion were known to all of the parties during the plea negotiations; Alessi had been charged in Count 5 of 72 Cr.473 with managing a continuing criminal enterprise and obtaining "substantial income" therefrom during the years 1967-1971[(21 U.S.C. §848(b)(2)(B))]; it was a matter of government record that he had not filed any income tax returns during that period which, per se, raised a suspicion of income tax evasion; Assistant United States Attorney Thomas Puccio, who is in charge of this case, specifically advised Mr. Gallina that the same witnesses who would have testified at the narcotics conspiracy would testify at this tax trial.

On January 21, 1976, the Hon. Orrin G. Judd U.S.D.J. denied Virgil Alessi's motion to dismiss the indictment reasoning that since:

".....there was no income tax indictment under way against Mr. Alessi, and he did not plead to any income tax indictment or information. There was simply a charge in the narcotic conspiracy indictment that he was engaged in a "continuing criminal enterprise" from which he derived substantial income from the sale of narcotics.

In 75 Cr 687, after extensive argument and analysis of the plea minutes, the court granted the motion to dismiss the indictment against Mr. Papa and denied it with respect to Mr. Alessi.

On October 28, 1975, when five codefendants in 75 Cr 687 pleaded guilty, the government stated that it would move to dismiss that indictment against Mr. Alessi at the time of his codefendants' sentencing, without prejudice to this income tax case or to an indictment pending in the Southern District of New York.

The same reasons which led the court to deny defendant's motion to dismiss 75 Cr 687 apply with equal force to the present income tax indictment. Not only was no plea taken to an income tax charge, but the fact that defendant Alessi received more lenient treatment than his codefendant Papa indicated that there is no reason to give an expansive effect to his plea. The reference in the conspiracy charge to the fact that he made money in the narcotics business is not the equivalent of a charge of income tax fraud.

The promise of the government that induced Mr. Alessi to plead guilty to 72 Cr 1133 does not extend as far as he asserts here. Even if the promise were construed to cover tax evasion, all that Mr. Alessi would be entitled to is an opportunity to vacate his plea to 72 Cr 1133 and reopen all counts of criminal indictment 72 Cr 473. Under the circumstances of this case, Mr. Alessi has not suffered enough detriment to be entitled to specific performance of the promise even if it were construed as he contends (and as this court has refused to construe it). See Santobello v. New York, 404 U.S. 257, 263, 92 S.Ct. 495 (1971).

From this order the defendant appeals.

POINT I

DUE PROCESS REQUIRES DISMISSAL OF THE INDICTMENT HEREIN BECAUSE TRIAL THEREON WILL PERMIT THE GOVERNMENT TO UNILATERALLY REPUDIATE THE TERMS OF AN EARLIER PLEA BARGAIN.

In October, 1972 Virgil Alessi entered a plea of guilty to a superseding information thus satisfying the underlying indictment 72 Cr.1133.*

The entry of the plea of guilty was preceded by negotiations between Alessi's counsel and James O. Druker, then Special Attorney in the Eastern District Strike Force Office. On behalf of the government, Druker promised that there would be no further prosecution of Alessi for crimes encompassed within the conspiracy to which he was about to plead guilty or on the basis of information then in his possession.

Nor was this a nudum pactum. As the prosecutor acknowledged on the record at Papa's sentencing, the case against all the defendants was weak. Conviction after trial was not highly probable. Thus, it is not as if the government were hoodwinked into a bad agreement. Both sides received something of value and gave up something of value. The government secured the conviction and punishment of an individual it believed to be a major figure in narcotics trafficking, but gave up the right to seek future indictments based upon the course of conduct which

*This indictment superseded 72 Cr.473 which alleged that Alessi, together with Papa and others conspired to traffic in heroin between 1/1/67 and 12/18/71.

had led to the first indictment. Virgil Alessi, in turn, relinquished that panoply of rights incident to a criminal trial before a jury which he might well have won, in exchange for the government's promise not to bring a future prosecution arising out of the activities which had led to the Eastern District indictment. There was, therefore, good and sufficient consideration on both sides. In good faith reliance upon the binding nature of this agreement, Alessi pleaded guilty to the conspiracy information, in satisfaction of the entire indictment, on October 2, 1972.*

The instant prosecution flies in the face of the pre-pleading agreement. By its own terms, it expressly repudiates the representations made by the government, through Druker, in the fall of 1972.

Papa and Alessi had been promised that their pleas of guilty would satisfy all related investigations. At the time of Alessi's plea, counsel for the government was aware of the information that ultimately lead to the instant prosecution of Alessi.**

As the Supreme Court has consistently and repeatedly stated, plea bargaining is an essential element of the criminal justice system. See, e.g., Santobello v. New York, 404 U.S.257, 260,261 (1971); Brady v. United States, 397 U.S.742 (1970).

*A five year suspended sentence and three years special parole, was imposed.

**Indeed, in many respects the evidence that the government is seeking to use is identical to that which would have been used in a trial of 72 Cr.473.

In order to preserve the integrity of this mode of disposing of criminal cases, however, such agreements must be honored and the promises underlying them must be kept. The Santobello court held:

This phase of the process of criminal justice, and the adjudicative element inherent in accepting a plea of guilty, must be attended by safeguards to insure the defendant what is reasonably due in the circumstances. Those circumstances will vary, but a constant factor is that when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled. (Emphasis added)

Santobello v. New York, supra, at 62

Nor can there be any doubt that Alessi has fulfilled his end of the agreement by serving the lengthy probationary term imposed. It is absurd to suggest a distinction between probation and a sentence of incarceration for the purpose of enforcement of the government's promise; indeed, non-custodial sentences are more likely to be the product of negotiation where the government deals from a position of weakness. In such situations, as encompassed here, where the defendant would likely be acquitted if he proceeded to trial, he gives ample consideration for the government's promise by accepting the probation terms. Thus, there can be no doubt that the promise herein is specifically enforceable by Alessi.

The defendant in United States v. Paiva, 294 F.Supp 742 (D.D.C. 1969) moved successfully to dismiss an indictment charging him with forging United States Savings Bonds. During

the pendency of the investigation which preceded the indictment, the defendant had been in jail on other charges. At the time he was facing prosecution for interstate transportation of stolen Treasury checks, forgery, two narcotics charges, two other felonies, and a host of other crimes. In order to dispose of the cases in an expeditious fashion, the government agreed to accept a plea of guilty to four of the felonies in exchange for its promise not to prosecute the defendant for forging the bonds, or any other paper before a certain date, if the defendant would cooperate in administratively closing the case against him. The agreement included a caveat that the defendant would not be required to implicate others. Nevertheless, the Secret Service continually pressed him to do so, and when he refused, advised the United States Attorney's Office that the defendant was "not cooperating". The United States Attorney then authorized prosecution for the forgery and, some ten months later, the defendant was indicted.

The court summarily rejected the government's theory that it was not bound by the promise, as well as its argument that specific performance of the bargain would violate the doctrine of separation of powers. Noting that the defendant had already commenced service of the sentence imposed after his plea of guilty, as has Alessi in the present case, the court granted the only relief appropriate: it held the government

to its promise, and dismissed the indictment.

[What] is held here is that if, after having utilized its discretion to strike bargains with potential defendants, the Government seeks to avoid these arrangements by using the courts, its decision to do so will come under scrutiny. If it further appears that the defendant, to his prejudice, performed his part of the agreement while the Government did not, the indictment may be dismissed. In effect, what is held here is that when the U.S. Attorney enters into an agreement with the defendant which involved the use of the judicial process, his responsibility transcends the executive function. . .

[For the court] not to act would create a void leaving the defendant helpless, the court responsible.

"Public confidence in the fair and honorable administration of justice, upon which ultimately depends the rule of law, is the transcending value at stake." (Sherman v. United States, 356 U.S. 369, 380 (1958) (Concurring opinion of Frankfurter, J.))

United States v. Paiva, supra, at 747.

In the Ninth Circuit, similar results obtained under similar facts. In United States v. Hallam, 472 F.2d 169 (9th Cir.1973), defendant pleaded guilty to the second count of a two-count indictment charging possession of an unregistered weapon and possession of a weapon by a felon. According to the plea bargain, the plea was entered to the second count and the first count was dismissed.

Some time later, however, the government became concerned about the sufficiency of the second count of the indictment to state an offense. Fearing that the defendant might bring a habeas corpus application attacking his conviction

after the statute of limitations had run on the first count, the government sought relief. The District Court obliged. It vacated the guilty plea, dismissed the count to which it was entered and thus permitted the government to re-indict the defendant on the first count. In a brief per curiam opinion, the Court of Appeals held this to be manifestly improper:

Judgment having been entered upon Count II it did not lie with the government unilaterally to seek to set it aside over the objections of the appellant. It is clear from Santobello... that due respect for the integrity of plea bargains demands that once a defendant has carried out his part of the bargain, the Government must fulfill its part. Here, this required that the dismissal of Count I of the original indictment must stand.

United States v. Hallam, supra, at 169.

And in an analogous situation, the Court did not hesitate to hold that a promise by the government not to prosecute made as part of a plea bargain, would be judicially enforced. See United States v. DeSena, 490 F.2d 692 (2d Cir. 1973).

The essence of Judge Judd's opinion denying Alessi's motion to dismiss the tax indictment herein was that at the time of Alessi's plea of guilty there was no income tax indictment against Alessi nor did he plead to any income tax indictment or information. This reasoning wholly misconstrues the thrust of Appellant's argument. It is conceded that Druker's promise not to prosecute was not coterminous with the accusatory instrument plead to. Clearly no promise was needed to afford

Alessi the protection already guaranteed by the double jeopardy clause of the Fifth Amendment. Rather, the value of Druker's promise, and that which was bargained for, was the promise not to prosecute for any substantive offense committed in the course of the conspiracy, even if evidence sufficient to prosecute such a substantive violation might only come into the government's possession at some later time. Thus, that Alessi pled guilty to any tax offense is wholly irrelevant. Likewise, he did not plead guilty to selling narcotics facilities to further his conspiratorial activities, 21 U.S.C. §843(b). However, it would be unthinkable for the government now to seek to prosecute Alessi for such an offense; just as is the case here, the fact that the substantive offense involves revenue statutes does not take it outside of the ambit of Druker's promise against future prosecutions for substantive offenses committed in the course of Alessi's conspiratorial activities.

Judge Judd's opinion denying Alessi's motion to dismiss the tax indictment herein also denies him the opportunity for an evidentiary hearing at which he might develop the factual issues pertinent to this motion. Indeed, the only hearing which has ever been held to determine the meaning of Druker's promise was before the Hon. Charles Brieant in the Southern District of New York in connection with Papa's motion to dismiss indictment 74 Cr.1082 . However, that hearing did not involve pending charges other than narcotics offenses, and consequently did not explore the government's knowledge of their investigation of tax offenses involving Alessi in 1972. Clearly, at the time

of the pre-neogtiations in 1972 the government was aware of Alessi's failure to file income tax returns for the years 1968, 1969, 1970 and 1971. Likewise, from its witnesses on the narcotics charges the government was aware that Alessi had generated taxable income from his narcotics activities. Indeed, the government alleged that fact as a necessary element of the continuing criminal enterprise charged in the underlying indictment. Thus, a prima facie case can be made that the government was aware of substantive tax offenses which might be charged against Alessi. However, the exact extent of its knowledge of the progress of any investigation of these charges are most peculiarly within the knowledge of the government. Indeed, without relief either by way of discovery or a hearing the appellant herein cannot in good faith allege more than he already has concerning the government's posture in 1972 in connection with these substantive tax offenses. However, this should not preclude Alessi from asserting the government's promise not to prosecute as a bar to the charges here. Indeed, as this court noted in United States v. Mallah, 503 F.2d 971 (2d Cir. 1974) in the theoretically similar context of Pacelli's double jeopardy motions, once the appellant has raised a reasonable inference that the pending charge violates double jeopardy, the burden shifts to the government to allege and prove the facts peculiarly within its knowledge which rebuts the defendant's good faith claim. Likewise, here it is agreed that Druker's promise encompassed future substantive offenses committed in the course of the

conspiratorial activities plead to. The sole bone of contention is whether the substantive tax violations charged here were part of the government's then pending investigation or were intended by the charges to be included within the promise. These issues can only be resolved by the evidence to be adduced at a hearing. Despite his timely pre-trial motion asserting his claim and requesting such relief, Alessi has been denied the opportunity for such a hearing. See United States v. Beckerman,, 518 F.2d 905 (2d Cir.1975).

The government promised Virgil Alessi that he would not be the object of a future prosecution based on information in its possession in 1972, nor for any crime encompassed within the conspiracy for which he had been indicted. Alessi, in turn, agreed to plead guilty and accept the consequences. He has kept his part of the bargain. The government must now be held to honor its half of the agreement.

CONCLUSION

For the reasons stated, appellant's motion to dismiss the indictment should be granted or in the alternative this court should remand for an evidentiary hearing.

Respectfully submitted,

NANCY ROSNER
Attorney for Appellant

401-35

Rec'd 3/15/76
Evelyn Cohen